

Complainant's application and Complainant filed this complaint on January 26, 2005.

FINDINGS OF FACT

1. The Complainant Rand H. Fishbein is one of the record owners of 9901 Avenel Farm Drive, Potomac, Maryland 20854. As such he is a member of the Respondent Avenel Community Association, Inc. Complainant submitted an application on October 6, 2003 to replace his existing roof with Grand Manor Certainteed, received by Respondent on October 7, 2003. Commission Exhibit 1 at 95. In that application, the Complainant proposed:

“I would like to have that [existing roof] replaced with a Grand Manor roofing product by Certainteed. We would be interested in using one of the dark gray/black colors, such as gatehouse, slate, black pearl, stonegate gray, colonial slate or silver.”

2. Respondent Avenel Community Association, Inc. is a homeowners association within the meaning of the Maryland Homeowners Association Act and Chapter 10B of the Montgomery County Code. Respondent enforces covenants recorded among the Land Records of Montgomery County as well as rules and regulations for the community known as Avenel.

3. Avenel consists of approximately 900 homes; eighty-seven (87) homes, including Complainant's home, are on two acre lots.

4. There are 13 villages in Avenel. Respondent contends that each of the 13 villages has, to varying degrees, a unique character based upon the architectural style of the dwellings in the village, the building materials used, the lot size, and the type of home (single family detached and townhouse).

5. Changes or modifications to property require an application to the Respondent's Modifications Committee. Declaration of Covenants, Conditions and Restrictions for Avenel Community Association, Inc., Article XI, Page 15. Commission Exhibit 1 at 200-201.

6. The Architectural Guidelines and Architectural Review Process for the Respondent, effective October 1993, revised January 1999, second revision March 2001, promulgated by the Board of Directors of Respondent provides in part at page 2 (Commission Exhibit 1 at 271):

Certain Avenel villages which are comprised of non cluster-type developments all shall also enjoy a community “theme” which the Modifications Committee will respect and consider in making decisions on applications from owners in these sections, much like the consideration which would be made in reviewing an application on a smaller lot. Generally, however, owners of property with detached housing have more leeway in choosing acceptable design solutions or making improvements on their property, especially if they are the owners of a lot of two acres or larger. This is simply attributed to the fact that they have more room to work with, are better able to provide adequate privacy screening and are often less visible from neighboring properties. There will be no relaxation of standards by the Modifications Committee simply because an improvement is requested on a larger lot.

7. The Architectural Guidelines and Architectural Review Process also states:

The purpose of this Manual is to serve as an adjunct to the Declaration of Protective Land Use Standards (the “Declaration”) found in your homeowners’ Manual. It is not intended as a legally binding document but rather as a handy reference tool, which will provide you with the information you need to understand the Architectural Review Procedure, and to make the system work for you and for all of your neighbors in the community. Each Application is considered on a case by case basis since the circumstances vary greatly. (Commission Exhibit 1 at 269)

8. The Architectural Guidelines and Architectural Review Process contain no standards with respect to materials that may be used or not used for roofs. Respondent’s witnesses testified that the Respondent denied the Grand Manor by Certainteed as a replacement roof material because, after viewing the Izzo roof and other roofs in the community that had been allowed this material (Coakley, Conley, Lieboff, Fisher) it did not like the appearance of Grand Manor Certainteed.

9. The properties in Avenel are also subject to a Declaration of Protective Land Use Standards recorded at Liber 7090, folio 509 (Commission Exhibit 1 at 49 et seq.) The functions of the Control Committee identified in the Declaration of Protective Land Use Standards have been assigned to the Modifications Committee. With respect to roofs, the Declaration of Protective Land Use Standards states:

Generally, homes will be traditional in design and substantially of brick construction with roofs of cedar shakes, slate or other shingles of at least 360 lbs. weight.

Declaration of Protective Land Use Standards at Page 3, Commission Exhibit 1 at 51.

The Grand Manor shingle by Certainteed that Complainant desires to use on his roof has a weight of 425 lbs. per square foot. The Panel understands that the significance of this weight designation, insofar as aesthetics are concerned, is that the heavier weighted material not only has a higher quality and durability, but usually has a superior three dimensional look and texture desirable to achieve visual attractiveness.

10. Over the years the Respondent has appointed at least two Roof Committees and hired one consultant to study alternate roofing materials that would be aesthetically acceptable in the 13 communities of Avenel. The Roof Committees have recommended to the Board of Directors and to the Modifications Committee that one acceptable material is Grand Manor by Certainteed, the material Complainant desires to use. The Board of Directors has allowed this material in some communities, but not in Complainant's community, Oaklyn Woods. Approval has been denied on the basis that generally the Respondent requires that the original design of the home be retained. Respondent's Response to Complaint, Page 3, Commission Exhibit 1 at 24. This statement, as an expression of a general plan or scheme of development, however does

not address the issue of specific roof materials that can be allowed for detached dwellings on two acre lots.

11. With regard to the use of the Grand Manor Certainteed material in the Prescott Village, the Complainant submitted a March 6, 1998 Memo (Complainant's Exhibit 7), from Rock Run Limited Partnership by A.M. Natelli, the Developer of Avenel, to the Modifications Committee. Prescott Village is a community that uses only natural slate roof material. The letter says in part:

“In follow-up of my letter of February 5, 1998 (copy enclosed), in which I advised you of the test application for the possible use of “Grand Manor” roof shingles as an acceptable material in Prescott, I am writing to advise you of the opinion of the Control Committee. After having viewed the sample roof application many times over the past month under different lighting and weather conditions, we recommend that you accept Certainteed’s “Grand Manor” shingle, specifically the “Black Pearl” color style, as a replacement roofing material in Prescott Village.

* * *

We intend as the New Construction Committee to permit Natelli Homes to offer natural slate as the standard material for new homes constructed in Prescott, with an option to new home buyers to choose “Grand Manor - Black Pearl” as an alternate. We believe that by doing this we are consistent in our recognition of the acceptability of either material to be chosen by prospective purchasers in the same manner as a choice being available to homeowners requiring replacement of roofs over time.”

12. The Complainant lives on a two acre lot in the Oaklyn Woods section of Avenel. The style of roofs in that section are either cedar shake or natural slate. No roofs have been approved to date in Oaklyn Woods for asphalt shingles of the type requested by Complainant, namely Grand Manor Asphalt Shingles by Certainteed, or for any other type of asphalt shingle.

13. The Respondent has approved the use of Grand Manor asphalt shingles in some of

the 13 communities in Avenel. Some approvals were unique, such as for example the Izzo test case in Prescott Village. Other approvals of Grand Manor were in Saunders Gate (a community in existence when Avenel was started, and incorporated into Avenel) and in Pleasant Gate (townhouses). Respondent contends these were consistent with the Architectural Guidelines, although those guidelines do not discuss roof materials.

14. Complainant's roof is not structurally designed to support natural slate shingles.

15. Section 22-98 of the Montgomery County Code provides that:

“A person must not make or enforce any deed restriction, covenant, rule, or regulation, or take any other action, that would require the owner of any building to install any roof material that does not have a class A rating, or an equivalent rating that indicates the highest level of fire protection, issued by a nationally recognized independent testing organization....

A person includes a homeowners' association as defined in Section 24B-1.

The owner of any building includes a unit owner in a condominium, a lot owner in a homeowners' association, and a shareholder in a cooperative housing corporation.

This section applies to all deed restrictions, covenants, rules, and regulations adopted before and after this section became law. [March 9, 1989]. (1989 L.M.C., ch. 23, Section 1.)”

16. Respondent's witness, Homer C. Earll, from the Cedar Shake and Shingle Bureau, testified that cedar shakes and shingles are at best rated Class C or Class B in themselves. In order to achieve a Class A cedar shake or shingle roof, one must use a Class B product with a cap sheet across the roof that is fire proof. In other words, the cedar shake or shingle material is not rated Class A in itself; a roof system becomes Class A with that material only by adding other elements.

17. The Complainant is thus faced with the dilemma that he cannot use natural slate

without substantially modifying the structural support system of his roof and he cannot use cedar shakes or shingles if he wants to use a Class A rated shingle material.

18. The Respondent's governing documents do not prohibit the use of asphalt as a roof material.

19. The Respondent has offered Complainant no alternative to: a) constructing a cedar shake or shingle roof "system" that is a Class A "system"; b) using a material that is not rated Class A; or C) modifying his roof structure to accommodate natural slate.

CONCLUSIONS OF LAW

1. The legal principles applicable to this case are found in Kirkley v. Seipelt, 212 Md.127, 128 A.2nd 430 (1957) and in Markey v. Wolf, 92 Md. App. 137, 607 A.2nd 82 (1992). Kirkley held that covenants that establish a general plan or scheme of development for a neighborhood with the intention to regulate the construction of dwellings in such a manner as to create an attractive and desirable neighborhood are enforceable in equity. Those covenants are enforceable notwithstanding that no specific standards are set out in the covenants themselves, so long as the approval or disapproval of alterations or modifications to property are reasonable and performed in good faith. The court specifically said:

We hold that any refusal to approve the external design or location by the Rodgers Ford Realty Corp. would have to be based upon a reason that bears some relation to the other buildings or the general plan of development; and this refusal would have to be a reasonable determination made in good faith, and not high handed, whimsical or capitious in manner. Kirkley, 128 A.2nd at 434.

Markey further elaborated on the legal standards, including the reasonableness rule, with respect to the constraints on disapproval of requested modifications. The Court of Special Appeals said in Markey:

We note, however, that public policy and the rules of construction with respect to restrictive covenants do not require that disapprovals and approvals should necessarily be treated equally. The strict construction rule has not been entirely abandoned; the reasonableness standard has simply been attached as an appendage. As we see it, the disapproval of a building plan might be a restraint on the free use of land and can adversely affect its alienability. The reasons for disapproval, therefore, should be very closely scrutinized. Markey, 92 Md. App. at 163-64.

2. The present case involves the denial of an alternative roof material on one of the 87 two acre lots in Avenel, specifically in Oaklyn Woods. The denial is based on the fact that the roof material requested is asphalt and asphalt has not been allowed in Oaklyn Woods. The roof material otherwise meets the only requirements of the Declaration of Land Use Standards with respect to roof materials. There are no other criteria governing roofs. The Architectural Guidelines call for flexible treatment for properties on two acre lots. The homeowner is constrained by the fact that his roof is not structurally strong enough to support natural slate, a circumstance similar to the Izzo case, where Grand Manor was allowed. The situation is further limited by the fact that the Montgomery County Code Section 22-98 does not allow an association to require a homeowner to use anything other than a Class A rated material.

3. With respect to Montgomery County Code Section 22-98, the Panel concludes that the plain language of that section deals with roof “materials” and not with roof “systems”. The Panel does not agree with the Respondent’s analysis of the Drumaldry Homes Association, Inc. v. Donald A. Couvillon decision of the Circuit Court of Montgomery County, Maryland, in Case No. 28575. That case began before the adoption of Section 22-98 and resulted in the enforcement of a consent order after the adoption of Section 22-98. The Respondent concludes from this chronology that the Circuit Court “found that the cedar shake Class A roof system was

compliant with the requirements of Section 22-98". Respondent Avenel Community Association, Inc., Closing Argument at Page 11. The facts of the case do not support this conclusion. There is no indication in the materials Respondent has submitted that the Circuit Court ever considered Section 22-98, even though the court's final ruling was entered thirteen days after the enactment of Section 22-98 (Section 22-98 was enacted on March 9, 1989 and the court's final order in Drumaldry was entered March 22, 1989. The actual date of the order is not given.) Furthermore, what the parties may do through a consent order to resolve a case that was begun prior to the enactment of Section 22-98 does not have direct bearing in this case on what the Respondent may do now, after the enactment of Section 22-98.

4. There are constraints upon the Complainant's choices for roof materials that are both suitable for his roof and that comply with Section 22-98 of the Montgomery County Code. There is no specific standard with respect to the composition of roof materials in Avenel. To the extent there are any standards, Complainants' choice of Grand Manor Certaineed complies with those standards. The Respondent's governing documents provide that leeway should be allowed for the two acre lots in Avenel. The governing documents do not prohibit the use of asphalt. In fact, the developer supported the use of asphalt as an alternative material for Prescott Village.

5. Notwithstanding that the thirteen Villages in Avenel may each have some unique, coherent plan or theme, there is no plan, scheme of development or theme with respect to roofs other than the provisions quoted in Finding of Fact No. 9 above from the Declaration of Protective Land Use Standards. As a consequence, a homeowner in Avenel has no resource to consult to determine what he may or may not be permitted to do when he replaces his roof. To say that the Respondent generally requires the original design of a home to be retained does not

offer a sufficient alternative to the Complainant in this specific case. By law, he is not required to install less than a Class A rated material, and it is unreasonable to ask him to redesign his roof to install natural slate. The Grand Manor Certainteed material is an alternative specifically endorsed by the Developer of Avenel. The rationale for denying that material is simply not present.

6. In view of the foregoing, the Panel must conclude in this specific case that the decision to disapprove the Complainant's request to replace his existing roof with Grand Manor Certainteed is unreasonable.

7. All of the requests for additional relief by Complainant, added during the course of these proceedings, and the request of Respondent for attorney's fees are denied. Complainant's request for costs and other compensation or reimbursements are also denied. While this case consumed a large amount of time and effort, and some of that time in retrospect may have turned out to be unnecessary, the Panel feels that the full airing of this case afforded all parties a fair hearing. The Panel can think of no relevant issues that were not addressed and considered.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is as of the effective date of this decision hereby:

ORDERED:

1. The Respondent must approve Complainant's application as submitted on October 6, 2003 to replace his existing roof with Grand Manor Certainteed at its first meeting after the date of this decision but no later than 30 days after the date of this decision.. The

application referred to is his October 6, 2003 application, received October 7, 2003, by the Complainant and his wife contained in Commission Exhibit 1. In that application, the Complainant proposed:

“I would like to have that [existing roof] replaced with a Grand Manor roofing product by Certainteed. We would be interested in using one of the dark gray/black colors, such as gatehouse, slate, black pearl, stonegate gray, colonial slate or silver”.

2. The Respondent shall take all necessary actions to implement and record the approval of Complainant’s application in its books and records.

3. All other relief requested by the parties is denied.

Panel Members Antoinette Negro, Lawrence E. Stein, and John F. McCabe, Jr. all concurred in this Memorandum Decision and Order.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days of this Order, pursuant to the Maryland Rules of Procedures governing administrative appeals.

John F. McCabe, Jr., Panel Chair